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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-6120

MAX WEINER, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATEMENT OF THE CASE

The testimony established that on Saturday, April 7, 1973, at approximately 1:45 P.M., the petitioner was arrested by officers of the Warminster Township Police Department who were dispatched to the scene of the arrest, a residential area, following the receipt of a number of complaints concerning excessive noise. Petitioner, with several other members of the consumer organization, par-

ticipated in the picketing of a Warminster Township resident for alleged consumer fraud. The neighborhood is residential, consisting of a closely knit community of homes within fifty feet of each other. The picketers were utilizing a loud speaker consisting of two bullhorn type speakers mounted on a tripod. The testimony contained in the magistrate transcript, which was introduced without objection at the hearing *de novo* before the Court of Common Pleas of Bucks County, reveals that the loud speaker was used at high volume.

Officer Vincent O'Neill was the first officer to arrive at the scene. He confronted one Mr. Thomas of the picketers group, and advised the latter not to use "the loud speaker due to the fact that we [the police] had [received] numerous complaints about noise disturbing the neighbors". The noise was described by a witness as being extremely loud and as being heard a block away, which is four to five hundred yards, away.

The petitioner refused to stop using the loud speaker and told the officers he had received permission from the police chief to use the public address system. The officers warned petitioner several times about using the loud speaker and finally told him he would be arrested if he persisted in using it. Petitioner responded by taking the microphone and broadcasting that the police were violating his civil rights. He was thereupon arrested.

REASONS FOR DENYING THE WRIT

When the Supreme Court of Pennsylvania Has Given the Pennsylvania Disorderly Conduct Statute a Narrow Area of Application Which It Deemed Necessary to be Consistant with the First and Fourteenth Amendments, Your Honorable Court Should Not Grant Certiorari Because the Issue Presented in the Instant Case Is Primarily Factual.

Appellant was convicted in the Court of Common Pleas of Bucks County for Disorderly Conduct pursuant to the Act of March 23, 1970, P. L. 84, Section I, as amended, 18 P. S. §4406, which in pertinent part provides:

> "Whoever wilfully makes or causes to be made any loud, boisterous and unseemly noise or disturbance to the annoyance of the peaceable residents nearby, or near to any public highway, road, street, lane, alley, park, square or common, whereby the public peace is broken or disturbed or the traveling public annoyed, is guilty of the offense of disorderly conduct. . ."

No area of constitutional law has received such close attention as the First Amendment Right to Free Speech. Numerous cases have established that, although the First Amendment guarantees freedom of speech, the state may still regulate a narrowly limited class of speech which constitutes "fighting words" or otherwise "abusive, vile, and opprobrious behavior." *Lewis v. City of New Orleans*, 42 U.S.L.W. 4241 (1974). As your Honorable Court observed in *Gooding v Wilson*, 405 U.S. 518 (1972):

> "The constitutional guarantees of freedom of speech forbid the state to punish the use of words or language not within 'narrowly limited classes of speech' *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Even as to such a class, however, because 'a line between speech unconditionally guaranteed speech which may legitimately be regulated, sup-

> pressed, or punished is finely drawn', *Speiser v. Randall*, 357 U.S. 513, 525 (1958), '[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom', *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). In other words, the statute must be carefully drawn or be authoritatively construed punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP v. Button* 371 U.S. 415, 433 (1963)."

However, unlike the situation presented in *Gooding v. Wilson* where the district court expressly found that "in the decisions brought to this court's attention, no meaningful attempt has been made [by the Georgia Appellate courts] to limit or properly define these terms." 303 F. Supp. at 955, and thus struck down the Georgia statute for vagueness, the Pennsylvania Court has given Pennsylvania's Disorderly Conduct statute a narrow area of application, *Commonwealth v. Greene*, 410 Pa. 111 (1963). Noting that the statute requires an offender to have been "loud, boisterous and unseemly", the Supreme Court of Pennsylvania held that:

> "[t]he cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult or disorder. Engaging in clamor and outcry in the public streets in a manner which arouses attention and causes people to draw together, whereby the highway may be obstructed, is the classic example of disorderly conduct."

410 Pa. at 115-116. The Supreme Court of Pennsylvania noted that noise ". . . does not of itself break the public peace . . . when the traveling public is not disturbed." *Id.* at 116. Rather the Pennsylvania Supreme Court specifically limited this statute's application to "unseemly" conduct, *i.e.* conduct which "is not fitting or proper in respect to the

conventional standard of organized society, or a legally constituted community." *Id.* at 113.

In applying those standards, the Supreme Court of Pennsylvania has sustained convictions for disorderly conduct in the following situations: where the defendant has blocked traffic with his automobile and used vile, threatening language against other motorists, *Commonwealth ex. rel. Jenkins v. Costello*, 141 Pa. Superior Ct. 183 (1940); defendants, members of a religious sect, employed a high volume loud speaker and proselytized on a door to door campaign often against the will of residents, *Commonwealth v. Palms*, 148 Pa. Superior Ct. 430 (1940); and defendants called out of windows using abusive, reviling epithets causing onlookers to congregate and blocking traffic, *Commonwealth v. Cooper*, 95 Pa. Superior Ct. 382 (1929).

Petitioner, however, argues that even with this narrow reading by the Pennsylvania Supreme Court, this statute is constitutionally infirm and too vague in light of the following three decisions of your Honorable Court in *Gooding v. Wilson, supra; Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971). These decisions are in apposite, however. Both *Gooding* and *Rosenfield* involved statutes which prescribed the use of offensive language designated variously by such adjectives as "offensive", "profane", "indecent", "abusive". The statutes were held to violate constitutional guarantees of freedom of speech in that the states are prohibited from punishing the use of words not within narrowly limited classes of speech. The Pennsylvania statute does not regulate the type of speech but merely the manner of making the speech. The petitioner and his associates were not prevented from continuing their protest in the instant case, they were merely required to do it in a manner which did not disturb the peaceable residents nearby. The third case, *Coates v. Cincinnati*, involved a restriction on the right to assembly which is not involved in the instant case.

The statute's proscription of unseemly noise is not unduly vague and does not leave the police officers with un-

fettered discretion. As has been pointed out above, noise alone is not enough for conviction; the noise must be such as not to be an integral part of a modern civilized community.

The instant statute does not run afoul of this Court's decision in *Saia v. York*, 334 U.S. 558 (1948). *Saia* involved an ordinance which gave the police chief the unfettered discretion, in advance, to determine who could use a loudspeaker and who could not. It was a classic case of prior restraint as opposed to the instant situation where the police are called upon to evaluate the situation after the loudspeakers are in use. Here, the police officers warned the petitioner that he was creating a disturbance and only when he continued in his action was he arrested. Certainly, the police can determine what noise is "not fitting or proper in respect to conventional standards of organized society, or a legally constituted community". As Judge Walsh properly observed in his opinion denying the petitioner's appeal: "We do not believe that the validity of the statute depends on whether it specifies in decibels the permissible sound level."

The statute being narrowly construed by the Supreme Court of Pennsylvania is thus constitutional and the only question facing this Court is whether the alleged acts of the petitioner and the facts presented in the instant case are sufficient to justify a conviction under the statute as drawn. Where the issue is primarily factual as it is in the instant case, it does not justify the exercise of certiorari jurisdiction by your Honorable Court. *Tacon v. Arizona*, 410 U.S. 351 (1973). In that case, even though a violation of constitutional rights was alleged, your Honorable Court dismissed its grant of certiorari as improvidently granted when it realized that the issue was primarily factual. Therefore, in the instant case, your Honorable Court should decline to grant certiorari.

However, in the event this Court determines to review the facts, they are sufficient to justify the conviction. Although the evidence as to the volume of noise is conflicting, the hearing judge resolved the issue of credibility in favor

of the Commonwealth. Since this finding is supported by the record, it may not be disturbed on appeal. *Commonwealth v. Zapata*, 447 Pa. 322 (1974). Here we have the persistent use of the loud speaker in a residential area after the police gave notice that a number of the "peaceable residents" had been disturbed and had complained. The homes in this neighborhood are within fifty feet of each other. The noise was that of shouting voices, magnified by a two-headed bullhorn, at high volume, mounted on a tripod. The purpose of the activities was one which could have been achieved in a modulated tone. The petitioner and his associates were seeking to educate by means of picketing and speechmaking. There is nothing which required extremely loud noise which could be heard a block away. Several children and residents were drawn to the scene and six complaints of disturbance were received by the police. It is submitted that these circumstances present just that vociferous shouting and yelling which provokes retaliation and public commotion as foreseen by Mr. Justice Musmanno in *Commonwealth v. Greene, supra.* at 116. This type of conduct is not proper in respect to a conventional society and is therefore unseemly. Further, the continued use of the loud speaker after the police repeatedly instructed the petitioner to stop and warned him of the consequences if the order were not complied with, amounts to a belligerent act and as such, the Supreme Court of Pennsylvania properly affirmed the petitioner's conviction.

CONCLUSION

For the reasons stated above, the Commonwealth requests your Honorable Court to dismiss the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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